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No. 87-2007

In The

Supreme Court of the United States

October Term, 1987

COLONIAL PIPELINE COMPANY,

Appellant,

v.

WRIGHT CONTRACTING COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

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STATEMENT OF MOTION

Comes now WRIGHT CONTRACTING COMPANY ("Wright"),* appellee, and moves the Court to dismiss the instant appeal on the grounds that the appeal is not within the Court's jurisdiction, that the judgment sought to be appealed is not final, that the constitutional issues raised by the appellant were not expressly passed on by the court below, that the case and decision below do not present the kind of clear, well-developed record necessary for the Court properly to consider the constitutionality of Georgia's statute in issue, and that the appellant is not aggrieved.

Colonial Pipeline Company ("Colonial") obtained an easement from landowners for laying pipeline through which it would pump highly combustible liquid petroleum at high pressure. Future development of the land was foreseeable and contemplated. In 1976, Colonial had the pipeline installed *thirty-one and three-quarter inches* above the depth specified in the easement. Thereafter Colonial engaged in myriad reckless acts that further invited the disaster that eventually occurred—during a 1982 grading operation by appellee, the unmarked, mislaid pipeline was struck and ruptured, creating an inferno. Wright brought suit seeking compensatory, consequential, and punitive damages. After an eight-day trial, a jury of twelve awarded Wright damages from Colonial, including punitive damages in the amount of five million dollars.

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*Wright Contracting Company was merged into The Hardaway Company, which was acquired by Murphree & Lisle Co., which now does business as The Hardaway Company. The Hardaway Company has no corporate affiliates.

Colonial repeatedly sought, first from the trial court and then from the Georgia Supreme Court, relief from the punitive damages award by means of a new trial. The supreme court did not even acknowledge appellant's equal protection argument, and expressly declined to pass on the due process argument. The Court agreed with appellant's alternative argument that the award was excessive and granted the very relief sought by the appellant—a new trial. The judgment is not yet final, as a new trial remains to be held.

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LEGAL ARGUMENT

I. The Appeal Is Not Within the Court's Jurisdiction Because No Final Judgment Was Rendered

This Court's jurisdiction does not extend to review of non-final judgments of state courts. "Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree.'" *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975); *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). Clearly, there is no final judgment in this case as the Georgia Supreme Court has remanded the cause for a new trial on the issue of punitive damages, the very issue with which this appeal is concerned.

The finality requirement serves the purpose of limiting "review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy*

v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973). The requirement is not merely a technicality, but "an important factor in the smooth working of our federal system." *Radio Station WOW, supra,* 326 U.S. at 124.

As Chief Justice Rehnquist pointed out in his dissenting opinion in *Cox, supra,* the finality requirement for jurisdiction over a judgment of a state court is grounded on more serious concerns than the limitation of jurisdiction over decisions of district courts, because of the differing underlying concerns. In this context, the statutory concept of finality is predicated not merely upon judicial efficiency but also upon congressional concern that uncontrolled federal judicial interference with state administrative and judicial functions would be detrimental to the federal system. *Cox, supra,* 420 U.S. at 503 (Rehnquist, J., dissenting). The dissent, citing Justice Frankfurter, expressed the view that these concerns are particularly serious when a constitutional challenge is asserted against a state court's decision on the state's own law. *Id.* at 504-05.

In addition, this Court has long upheld the principle that constitutional issues are too important to be decided except when absolutely necessary. This Court's policy of strict necessity in disposing of constitutional issues was discussed in *Minnick v. California Dept. of Corrections,* 452 U.S. 105 (1981). In that case, the Court quoted from *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947), commenting on the close connection between the policy of avoiding premature adjudication of constitutional issues and limitations on the Court's jurisdiction. The *Rescue Army* court described the policy as a corollary of the case and controversy rule. The Court stated, "The policy's

ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality." 331 U.S. at 571. The Court pointed out that while this policy results in the deferring of decisions in order to protect the functioning of government "and all its coordinate parts," the premature and relatively abstract decisions that would result if the policy were not followed "have their part too in rendering rights uncertain and insecure." 331 U.S. at 571.

The importance of the finality requirement must not be underestimated. Within the framework of the foregoing cases, it is clear that the Court should not entertain Colonial's appeal. Appellant cites *Cox Broadcasting, supra,* for its contention that the requirement of finality is satisfied. Jurisdictional Statement at 3, n. 3. In *Cox,* the Georgia Supreme Court had upheld against first amendment challenges a statute prohibiting the publication of the name of a rape victim. This Court determined that it would treat that judgment as final, despite the further proceedings pending in the state court. Writing for the Court, Justice White identified four categories of cases in which the Court has treated a decision on a federal issue as a final judgment even though additional proceedings remained to be held in the lower courts. This case does not fall within any of the categories enumerated, in which "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' . . . as well as precipitate interference with state litigation." *Cox, supra,* 420 U.S. at 477-78 *(quoting Radio Station WOW, supra).* In cases in two of

the four categories, "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." Id. at 478.**

Appellant does not seek to bring itself within either of those exceptions. Rather, it likens its case to that of *Cox*. It argues that even though it might prevail at trial on non-federal grounds, which would obviate the constitutional question, this Court should treat the judgment as final and render a constitutional decision that might otherwise prove unnecessary.

The reasons that justified that decision in *Cox* are not present here. The *Cox* Court stated that in those cases in which the federal issue has been finally decided with further proceedings pending, *and* where a reversal of the state court on the federal issue would be preclusive of any further litigation, *and* where the refusal to review immediately the state court decision might seriously erode federal policy, the Court *may* decide the federal issue. The case at bar does not meet the criteria of the above-defined

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** The first category includes cases in which further proceedings will be held but where the federal issue decided is conclusive and the outcome of further proceedings preordained so that the case is for all practical purposes concluded. Appellant could well prevail on the merits at the retrial on non-federal grounds, particularly given the Georgia Supreme Court's interpretation in this case.

The second category of cases includes those in which the federal issue will survive and require a decision regardless of the outcome of future state court proceedings. In this case, since the matter may be resolved in favor of the appellant on non-federal grounds, it is highly questionable whether the federal issue would survive and require a decision.

exception to the finality requirement. First, appellant has not established that the state court finally decided the federal issue. Indeed, the state court significantly revised the interpretation of the Georgia punitive damages statute and remanded the case for trial under the new criteria. Thus, not only have the federal issues never been expressly decided in the state court, but the new state court interpretation of the punitive damages law has not even been applied to the facts.

If this Court established due process guidelines for the trial of punitive damages, that would "merely contro[l] the nature and character of, or determin[e] the admissibility of evidence in, the state proceedings still to come," *Cox, supra,* 420 U.S. at 483. It would not be preclusive of further litigation.

There is also no reason to suspect that the Court's refusal to review immediately the state court decision might seriously erode federal policy. The case does not involve any potential criminal liability nor does it involve first amendment rights, so that jurisdiction would be necessary to foreclose unwarranted restrictions on the press. Further, there is no reason to believe the retrial, limited solely to the issue of punitive damages, will be particularly complex or lengthy or a significant enough burden on the appellant that this Court should undertake a premature evaluation of constitutional issues, which might never arise if the retrial is permitted. Finally, this is simply not a case where these or other parties will be uncertain about the propriety of future conduct or exposed to unreasonable risk of liability pending the resolution of these issues, as would be the case in those instances where the question presented is whether certain conduct

could result in the imposition of criminal penalties or civil liability in the first instance. *Cox, supra,* 420 U.S. at 486.

Appellant makes an oblique reference, for the first time in the history of this litigation, to rights against "double jeopardy." Jurisdictional Statement at 3, n. 3. This argument should not be considered, because raised now for the first time. Furthermore, appellant's effort to excite the Court's sympathies by trying to come under the mantle of protections afforded criminal defendants should not avail it. This is not a criminal case; the principles sought by appellant do not apply.

II. The Record is Inadequate For the Court to Consider the Issues Raised by Appellant.

Although the appellant raised the issues of due process and equal protection in the state courts, the majority of the court did not directly address either of these issues. In fact, the plurality decision did not even acknowledge the equal protection claim. Appellee submits that the requirement that a federal issue be both raised and decided in the state court before it may properly be addressed by this Court is a jurisdictional and not merely a prudential restriction. *See State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154 (1945), *reh'g denied,* 324 U.S. 887 (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940); and cases discussed in *Illinois v. Gates,* 462 U.S. 213, 218-19, *reh'g denied,* 463 U.S. 1237 (1983).

Even if this Court determines, however, that the "not pressed or passed upon below" rule is a prudential restriction rather than a jurisdictional one, those prudential con-

siderations should lead this Court to decline review of appellant's claims. "These policies are first, comity to the states, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal." *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645, 1651 (1988). Because the questions raised on the issues of due process and equal protection are particularly difficult issues and because a decision thereon would have far-reaching consequences on issues of great public importance, this court should scrupulously adhere to the traditional limitations on its discretion. *Id.; Mishkin v. New York,* 383 U.S. 502 (1966).

The record in this case is not properly developed for review of the federal constitutional issues, and this Court does not have the benefit of an opinion of the state supreme court applying these federal principles to the state's law. Although appellant's claims of due process and equal protection were argued below, the opinion below did not address these issues. Further, the court significantly altered its interpretation of the state's punitive damages statute. In effect, the state supreme court issued new criteria for the determination of when and in what amount punitive damages can be awarded. Until the case has been retried on the basis of this new law, there will be no factual record developed under the punitive damages law in the State of Georgia as it now stands, nor will there be any appellate court application of the new law to these or other facts. Accordingly, the record is ambiguous as it relates to this new interpretation of Georgia law, and the Georgia courts themselves have not had an opportunity to test the newly enunciated legal precepts, as applied

to a concrete factual situation, against the limitations of the state or federal constitution.

The Georgia Supreme Court, in its opinion below, introduced requirements to the implementation of the punitive damage statute that may, in application, eliminate appellant's due process and equal protection concerns. The court held that in a punitive damages case the trier of fact must determine not only whether there is evidence of willful misconduct, malice, fraud, wantonness or oppression, or that entire want of care which would raise the presumption of a conscious indifference to the consequences as required in *Southern Ry. Co. v. O'Brien,* 119 Ga. 147, 45 S.E. 1000 (1903), cited by the court, but that the jury must also determine whether personal injury or death was involved or mere damage to property, and whether the negligence was active or passive (Jurisdictional Statement, A-11). In addition, on rehearing, the court suggested that the jury be required, through use of an interrogatory-type verdict form, to specify the grounds on which it awarded damages, and to follow the court's new criteria in determining the amount. This includes consideration of whether negligence was active or passive and whether there was bodily injury or mere property damage, and requiring that the punitive damages award bear a "rational relationship" to the actual damages awarded and to the offense (Jurisdictional Statement, A-16).

Heretofore, when the Georgia courts have denied punitive damages on the ground of passive negligence, they have done so on the understanding that negligence that is truly passive cannot evidence willful misconduct, malice,

or other indicia of malice set forth in the *Southern Ry.* opinion. Dissent, Jurisdictional Statement, A-14; *see also Rossville Apartments Co. v. Britton*, 178 Ga. App. 194, 342 S.E.2d 504 (1986). The court held that passive negligence may be enough to permit punitive damages but that this factor should be considered by the jury in deciding whether to award the damages and in what amount.

Further, the court now requires the jury to consider whether there was bodily injury to the particular plaintiff involved. The court's holding in this regard represents a dramatic departure from all prior law. There has never before this case been a distinction between personal injury and property damage for the purposes of awarding punitive damages. In fact, in *Smith v. Milikin*, 247 Ga. 369, 276 S.E.2d 35 (1981), the Supreme Court of Georgia approved an award of $156.00 in actual damages and $50,000.00 in punitive damages in a land line case involving only property damages. Furthermore, there has never been a requirement in the State of Georgia that punitive damages bear any particular monetary or proportional relationship to the amount of actual damages as the court now requires. In fact, the Georgia Supreme Court specifically rejected that argument in *Smith v. Milikin, supra*, holding that where punitive damages were awarded to deter the wrongdoer, as in this case, the award was not required to evidence a reasonable proportion to the extent of the injury and was instead to be the amount, as measured by the enlightened conscience of an impartial jury, that would be required to deter future acts.

The Supreme Court has not yet had an opportunity to observe its new "rational relationship" standards (either

the relationship to the actual damages or to the offense) applied to the facts of this or any other case, nor to observe how each of its new criteria may affect the appellant's constitutional claims. Accordingly, until this newly-established law has actually been applied to the facts of the case and considered by the state's highest court, the question is not ripe for consideration by this Court, nor is the record one upon which so weighty a constitutional decision should be made. *See Banker's Life & Casualty Co., supra,* and *Minnick v. California Dept. of Corrections, supra.*

Perhaps even more importantly, the state legislature has already enacted legislation dramatically restricting the imposition of punitive damages in Georgia. O.C.G.A. Sec. 51-12-5.1, applicable to causes of action arising on or after July 1, 1987, enacts "a clear and convincing evidence" standard of proof, requires trial on whether punitive damages should be awarded and the amount thereof, limits awards in products liability cases to one award of punitive damages in Georgia from a defendant for any act or omission, places a $250,000 cap on punitive damages awards except in products liability cases and cases where the defendant specifically intended to cause harm, and provides that seventy-five percent of any punitive damages awards in products cases, less proportionate costs of litigation, be paid into the State treasury. There are no appellate decisions interpreting this new law and no consideration by the Georgia Court of Appeals or Supreme Court of the constitutionality of this new statute, which will soon make the law enunciated below in this case obsolete. In light of the state legislature's action in addressing the issue of punitive damages in such a sweep-

ing fashion, this Court has no reason now to decide the issues raised in this case, but should wait for a properly presented case under the new statute. *See Bankers' Life, supra,* 108 S.Ct. at 1651. Such a course of restraint is particularly appropriate in this case.

III. The Appellant Received Exactly the Relief It Sought in the State Court

Colonial has made various and repeated efforts to avoid the punitive damages award assessed against it by the jury. It did so by motion to the trial court and by appeal to the Georgia Supreme Court. Colonial moved for judgment notwithstanding the verdict and for a new trial. Colonial set forth in its appendix (A 28-29) only those portions of the motion seeking judgment that raised its constitutional arguments. Alternatively, Colonial sought a new trial. It urged the trial court to define the standards for punitive damages in a manner acceptable to Colonial. Motion for Judgment Notwithstanding the Verdict and Motion for New Trial; Amendment to Motion for New Trial of Colonial Pipeline Company (R 168-71, 183-86).

On appeal to the state supreme court Colonial argued that the award was excessive or, alternatively, if *not* excessive, that the award or the statute violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.

The Georgia Supreme Court agreed with appellant that the punitive damages award was excessive. It granted the very relief sought by appellant—a new trial with clarified standards designed to cure any infirmities that had

allowed the excessive (according to that court) award. The court accepted appellant's invitation to avoid the constitutional due process and equal protection arguments by finding the award excessive. (Opinion, Jurisdictional Statement, A-5, n.2.) Appellant should not now be heard to argue that the court below erred in granting the relief appellant sought. The new trial under the new guidelines will amply protect Colonial's constitutional rights.

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CONCLUSION

If this Court undertakes to decide the merits of the instant appeal, the result will be a decision on a broad, abstract question that may or may not have application to Georgia's law of punitive damages either as enunciated by the state supreme court for pre-July 1, 1987, cases or as enacted by the Legislature in its sweeping reform of the statutory law. The case is not appropriate for consideration by this Court at the present time. The constitutional issues have not been directly addressed, under either Georgia's former punitive damages law or the new statute, by the state supreme court; the decision below is not final; and the appellant obtained the relief sought below. The constitutional issues are premature, and this Court should dismiss the appeal.

Respectfully submitted, this 8th day of July, 1988.

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